Supreme Court, U.S.
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(2)

IN THE

SUPREME COURT OF THE UNITED STATES

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No. 91-60

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DESPINA SMALIS,

Petitioner

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent

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# SUPPLEMENTAL BRIEF FOR PETITIONER

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## SUPPLEMENTAL STATEMENT OF THE CASE

After the instant certiorari petition was filed, the opinion of the Supreme Court of Pennsylvania was published at 590 A. 2d 1250, appearing in an advance sheet dated July 12, 1991. On July 23, 1991, a dissenting opinion authored by Mr. Justice Papadakos and joined by Mr. Justice Larsen (who had also joined Mr. Justice Zappala's previously filed dissent) was filed.

Mr. Justice Papadakos took the position that resumption of trial would offend the federal Double Jeopardy Clause, the Due Process Clause, and the Confrontation Clause.

## SUPPLEMENTAL REASONS FOR GRANTING THE WRIT

Mr. Justice Papadakos states:

> Simply because the instant facts do not fit neatly into previously existing categories

> is no reason not to find a constitutional violation where fundamental constitutional policies are impinged [upon]. The delay here was too long to allow us in any but a mechanical and overly technical way to conclude that initial jeopardy continued. . . . It would be patently unfair to subject Appellant to further trial at this point. [17b infra.]

To the foregoing petitioner can only add: Amen!

Respectfully submitted,

Norma Chase

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Attorney for Petitioner

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

---

COMMONWEALTH OF PENNSYLVANIA,
Appellee

vs.

DESPINA SMALIS,
Appellant

No. 57 W.D. Appeal Dkt. 1989

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DISSENTING OPINION

MR. JUSTICE PAPADAKOS

July 23, 1991

I am convinced that the adjournment of the non-jury trial that occurred in this case, which, in turn, resulted in a ten-year break in the continuity of that trial (a substantial period of time by any standard), caused by repeated appeals instigated by the Commonwealth, is the functional equivalent of a mistrial in

that it removed the immediacy of the threat to the defendant's liberty. It is, accordingly, an event that terminated jeopardy. Once jeopardy has ended, further proceedings directed at determining guilt or innocence, even the completion of an interrupted trial, are prohibited.

Jeopardy may be deemed to "continue" after the abortion of a trial only when that action was based on manifest necessity. The instant stay order was not; the Appellant-defendant (and her co-defendant) were willing to suffer the reinstatement of the murder charges to avoid the interruption of the trial. The prosecutor rejected this alternative.

Jeopardy exists when a trial is in some sense in progress, when some phase of the determination of guilt or innocence is taking place. I am persuaded that the

constitutional provision that a defendant may not be "twice put" in this condition gives a defendant a right to reasonable continuity of the process by which guilt or innocence is determined. An indefinite adjournment that results in a ten year break in the continuity of the trial is an event terminating jeopardy and precludes retrial if it is ordered over the protest of the defendant (as here), in the absence of manifest necessity (as here), and is caused by multiple appeals, instigated by the Commonwealth (as here).

The indefinite nature of the adjournment in this case and its resultant ten year delay distinguish this case from the handful of cases in other jurisdictions that have considered and rejected double jeopardy claims arising out of mid-trial continuances. The longest break involved in any such case

appears to have been a 42-day adjournment (to a date certain) in a North Carolina juvenile proceeding. Matter of Hunt, 46 N.C. App. 732, 266 S.E.2d 385 (1980). A number of other cases have found shorter recesses to be inoffensive to the Double Jeopardy Clause. Webb v. Hutto, 720 F.2d 375, 379 (4th Cir. 1983) (five days); State v. Sipe, 537 So.2d 178 (Fla. App. 1989) (four weeks); State v. Poullard, 532 So.2d 327, 330 (La. App. 1988) (two days); State v. Johnson, 529 So.2d 466 (La. App. 1988) (two weeks); King v. State, 527 So.2d 641, 644 (Miss. 1988) (six days); State v. Carter, 289 N.C. 35, 220 S.E.2d 313, 318 (1975) (seven days); Wortham v. State, 750 S.W.2d 326, 328 (Tex. App. 1988) (seven days). See also, State v. Jackson, 485 So.2d 630 (La. App. 1986) (recess of unspecified length held not to implicate Double Jeopardy Clause).

What these cases establish is that a defendant cannot demand perfect continuity of the trial process. They do not negate the existence of a right to reasonable continuity.

Two decisions have found double jeopardy to be violated following a recess in a non-jury trial. In State v. O'Keefe, 135 N.J. Super 430, 343 A. 2d 509 (1975), the prosecutor was granted a two-week recess so that he could obtain evidence without which his case was insufficient. The court found his neglect inexcusable and held that under such circumstances the continuance was an unreasonable break in the continuity of the trial, stating at 343 A. 2d 514:

> A continuance differs from a mistrial-retrial in that it does not deprive the defendant of a verdict rendered by the original tribunal. Thus, a continuance protects the defendant's interest in securing an

> acquittal from a tribunal which has heard a weak State's case -- one basis for the prohibition against double jeopardy. [Citations omitted.] Yet, double jeopardy has been invoked to prohibit a second prosecution even though the first jury heard no evidence before a mistrial was declared. [Citations omitted.]
>
> Accordingly, a continuance might also violate the double jeopardy prohibition, for the essential element of double jeopardy is the oppressive harassment of a presumably innocent person attendant upon a repeated prosecution. There is not only the anxiety of a second trial, but the often greater anxiety in awaiting a second trial. This affects a defendant personally as well as in his relations with others.

Accord: Belveal v. Rambo, 487 P.2d 714 (Okl. Cr. App. 1971).

The O'Keefe decision recognized that there are policy concerns underlying the Double Jeopardy Clause that go beyond the interest of the defendant in the identity of a tribunal or his interest against

proceedings that allow a prosecutor an opportunity to improve on a previously presented case, and that a defendant's interest against protraction may be infringed even when the latter two interests are not.

The O'Keefe court was not alone in recognizing the interest against protraction that the Clause, protects. In Arizona v. Washington, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 707 (1978), the United States Supreme Court stated:

> [T]he constitutional protection also embraces the defendant's "valued right to have his trial completed by a particular tribunal." [Footnote omitted.] The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and

> may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. [Emphasis added; footnote omitted.] [Id. at 503-504, 98 S. Ct. at 829-30, 54 L. Ed. 2d at 727.]

Similar observations appear in Green v. United States, 355 U.S. 184, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expenses and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. [Emphasis added.] [Id. at 187-88, 78 S. Ct. at 223, 2 L. Ed. 2d at 204.]

And, in United States v. Jorn, 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971), the Supreme Court stated:

> Society's awareness of the heavy personal strain which a criminal trial represents for the individual defendant is manifested in the willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws. [Id. at 479, 91 S. Ct. at 554, 27 L. Ed. 2d at 553 (1971).

One commentator has suggested that the interest against protraction is the real interest underlying the interest in the identity of the tribunal:

> A defendant has a valued right to have his trial completed by a particular tribunal, not because he has a constitutional interest in the identity of any particular tribunal, but because he has an interest in being able "to conclude his confrontation with society" [footnote omitted] once it has begun. Once a trial begins, a defendant has a legitimate interest in getting the trial over with "once and for all." [Footnote omitted.] It follows, therefore, that he also has an interest in continuing with "the first jury" [footnote omitted] impaneled in the case because changing the jury means interrupting the trial. To that extent, the defendant's interest

> in retaining the particular tribunal with which he began is merely an incident of his primary interest in being able to complete the trial itself. [Westen and Drubel, Toward a General Theory of Double Jeopardy, 1978 Supreme Court Review 81, 90; emphasis added.]

While the U.S. Supreme Court has resisted any erosion of a defendant's interest in the identity of the tribunal, in Crist v. Bretz, 437 U.S. 28, 98 S. Ct. 2156, 57 L. Ed. 2d 24 (1978), they made clear that the interest was not the only one protected by the Clause, stating:

> [Double jeopardy] concerns -- the finality of judgments, the minimization of harassing exposure to the harrowing experience of a criminal trial, and the valued right to continue with the chosen jury -- have combined to produce the federal law that in a jury trial jeopardy attaches when the jury is empaneled and sworn. [Id. at 38, 98 S. Ct. at 2162, 57 L. Ed. 2d at 33.]

I believe that the concerns protected by the Clause have a dignity of their own;

it is not only those threatened proceedings that give a prosecutor a chance to improve a prior performance that subject a defendant to "embarrassment, expense and ordeal" and inflict a "continuing state of anxiety and insecurity" upon a defendant. A second jeopardy need not involve a different tribunal to be a "harrowing experience" and an occasion of "heavy personal strain." Nor is any special showing of a probability of the conviction of an innocent defendant required for valid double jeopardy claim; we recognized in Commonwealth v. Bolden, 472 Pa. 602, 373 A. 2d 90 (1977), the right involved is not only a right not to be convicted unjustly following the termination of the initial jeopardy but a right not to be tried at all.

The consequence of recognition of the double jeopardy implications of protracted recesses is not their absolute preclusion -- there may be occasions when a lengthy recess presents a reasonable alternative to an ordinary mistrial -- but their exposure to scrutiny for manifest necessity. Instantly, manifest necessity was non-existent. To the contrary, the ten-year delay here was caused by the Commonwealth's stubborn insistence on multiple appeals and proceedings all to the detriment of Appellant's right to a prompt and speedy trial.

It will be remembered that the remaining charges here were stayed pending the Commonwealth's appeal of the order sustaining the demurrers. The Superior Court quashed the appeal and held that the principles of double jeopardy barred the Commonwealth from appealing an order

sustaining a demurrer to the evidence. Commonwealth v. Smalis, 331 Pa. Superior Ct. 307, 480 A. 2d 1046 (1984). The Commonwealth appealed to this Court and we reversed the Superior Court and remanded with instructions to the Superior Court to pass upon the merits of the demurrer ruling entered by the trial court. Commonwealth v. Zoller, 507 Pa. 344, 490 A. 2d 394 (1985). Appellant petitioned the United States Supreme Court for a writ of certiorari, which was granted. The United States Supreme Court agreed with the Superior Court and held that the Commonwealth's initial appeal of the demurrers was barred by double jeopardy and reversed this Court. Smalis v. Pennsylvania, 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986). In accordance with this mandate, we entered a per curiam order vacating our previous

order and reinstating the order of the Superior Court which quashed the Commonwealth's appeal. Our per curiam order was filed on July 29, 1986; the trial in this case had commenced on or about November 12, 1980.

At this point, the Commonwealth sought to resume trial on the remaining charges of involuntary manslaughter, reckless endangerment, failure to prevent a catastrophe and theft by deception. Appellant filed a motion to dismiss these charges on double jeopardy, due process and confrontation clause grounds. The Superior Court, utilizing primarily a speedy trial analysis, affirmed the trial court's denial of the motion to dismiss and remanded the case to the trial court for further proceedings. This appeal followed.

The Commonwealth took a calculated gamble on appeal and delay and they lost. There was no manifest necessity to this course of action. The Commonwealth cannot ignore the consequences for double jeopardy purposes of their freely chosen acts.

Moreover, the interest against multiple prosecutions may also be infringed (as here) by permitting a trial to be bifurcated by an appeal. In United States v. Jaramillo, 510 F.2d 808 (8th Cir. 1975), the court stated:

> [Resumption of the non-jury trial] would subject the appellees to the same hazards incurred in a second trial that are clearly prohibited by the double jeopardy clause. The remand would provide the government with another chance to convict the appellees by exhaustively reviewing the record, marshaling the facts and rearguing the case in a manner not previously presented. The appellees would be put to further expense, ordeal, and

anxiety. [Id. at 812; emphasis added.]

While it might be argued that applying the double jeopardy clause here would be retroactive and hence unfair to the Commonwealth because the Commonwealth relied on a procedure presumably valid at the time, that argument should be rejected. The cases dealing with issues of retroactive application of double jeopardy law have consistently held double jeopardy decisions to be retroactive notwithstanding prosecutorial reliance on prior standards. Robinson v. Neil, 409 U.S. 505, 93 S. Ct. 876, 35 L. Ed. 2d 29 (1973); Vogel v. Commonwealth of Pennsylvania, 790 F.2d 368 (3rd Cir. 1986); Commonwealth v. Richbourg, 442 Pa. 147, 275 A. 2d 345 (1971).

In short, I have concluded that constitutional standards enunciated under

the Double Jeopardy Clause preclude further proceedings in this case. Simply because the instant facts do not fit neatly into previously existing categories is no reason not to find a constitutional violation where fundamental constitutional policies are impinged. The delay here was too long to allow us in any but a mechanical and overly technical way to conclude that initial jeopardy continued. The facts speak otherwise. It would be patently unfair to subject Appellant to further trial at this point.

The unfairness of subjecting Appellant to further trial here also, it seems to me, rises to the level of a due process violation by violating the Confrontation Clause of the Fifth Amendment. See, Commonwealth v. Zoller, 507 Pa. 344, 490 A. 2d 394 (1985). The issue of the effect of the lapse of time

on the ability of the factfinder to decide the case on the basis that the Constitution contemplates -- that is to say, on live testimony -- has been ignored by the majority.

This court previously held that the action of a defendant in demurring to the evidence was an "election" that removed any double jeopardy barrier to further proceedings, Commonwealth v. Zoller, supra, but nonetheless we rejected the suggestion that resumption of trial was an appropriate procedure, and remanded the companion case, which was also non-jury, for a new trial, stating:

> We stated in [Wimberly, supra] that "[i]n those cases where this Court has concluded that a demurrer was granted in error, we have remanded for a new trial." Id.
>
> Accordingly, we reverse the Superior Court and remand Commonwealth v. Zoller, supra, where it was determined that the

> demurrer was granted in error, for a new trial. With regards to Commonwealth v. Smalis, supra, we remand to the Superior Court to pass upon the merits of the demurrer ruling entered by the trial court. [Id. at 359, 490 A. 2d at 402; footnote omitted.]

It is implicit from the foregoing that this Court found resumption of a non-jury trial after a "recess" for an appeal objectionable for some reason independent of double jeopardy considerations, and Appellant cogently argues that the reason is that this Court recognized that the Confrontation Clause contemplates that a verdict will be rendered at a time when the confrontation it promises the defendant will be fresh in the mind of the factfinder, and does not countenance a separation of several years between the confrontation and the deliberations that produce the verdict. In Jaramillo, supra, the court, after holding that the

resumption proposed there was as offensive to the Double Jeopardy Clause as retrial, went on to point out that resumption would impair other constitutionally protected interests of the defendant:

> Even if the same trial judge were available on remand, there is nothing to assure that the passage of time and the resultant dimming of the memory will not adversely affect the rights of the appellees. [Id. at 512.]

The concerns expressed by the Jaramillo court are at least equally applicable to the instant case, particularly since this case involved 53 witnesses whose testimony consumed some 2,000 transcript pages over a period of four weeks. A conviction based on a record as voluminous and as stale as the instant one would deprive Appellant of due process of law.

I would dismiss the remaining charges against Appellant.

Mr. Justice Larsen joins this Dissenting Opinion.